Supreme Court, U. S.
FILED
AUG 6 1977
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1137

ARTHUR FULMAN, ET AL., TRUSTEES,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 17, 1977
CERTIORARI GRANTED MAY 23, 1977

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Civil Action No. 73-1109-M

PIERCE INVESTMENT CORP.,
PLAINTIFF,
v.
UNITED STATES OF AMERICA,
DEFENDANT.

DOCKET ENTRIES

1973		
Apr.	10	Complaint filed. Summons issued.
June	7	Defendant's answer filed.
1974		
Mar.	13	Marshal's return of summons with service made on 4/11/73, filed.
Aug.	8	Stipulation of facts filed.
	28	Plaintiff's motion for leave to amend complaint, assented to, filed.
Sept.	10	MURRAY, J. Re plaintiff's motion for leave to amend complaint. All copies to counsel.
Nov.	4	Defendant's motion for summary judgment, filed.
	4	Defendant's memorandum in support of its motion for summary judgment.
	5	Plaintiff's motion for summary judgment, filed.
	5	Plaintiff's memorandum of law, filed.
	22	Plaintiff's reply to defendant's memorandum of law, filed.
	25	Defendant's reply memorandum in support of its motion for summary judgment, filed.
Dec.	20	MURRAY, J. ORDER, entered. (Plaintiffs shall file within 7 days a statement in support of their motion for summary judgment) Copies to counsel.

1974

31 MURRAY, J. ORDER, entered. (Defendant shall file within 7 days of receiving statement in support of its motion for summary judgment) Copies to counsel.

1975

Jan. 9 Letter dated 1/7/75 to Judge Murray from J. Fink, U.S. Dept. of Justice, Washington, D.C. enclosing a copy of stipulation of facts (filed 8/8/74), filed.

9 MURRAY, J. ORDER, entered. "The parties shall within ten (10) days of the date of this order file memoranda specifying objections, if any, to the materiality or relevancy of any stipulated fact, and supporting the objections by citations of authority." Copies to counsel.

13 Letter dated 1/10/75 to Judge Murray from J. Fink, U.S. Dept. of Justice, Washington, D.C. informing him that the defendant has no objection to any fact contained in the stipulation filed 8/8/74, filed.

15 Letter dated 1/14/75 to Judge Murray from J. Margolis, Esq., counsel for the plaintiff, stating that he has no objections to the stipulation of facts previously filed in the case, filed. (Per Judge Murray's Order of 1/9/75).

Apr. 17 Copy of letter dated 4/14/75 to J. Margolis, Esq. from U.S. Dept. of Justice, re substitution of corrected page 4 of a memorandum, filed.

Aug. 28 Letter to Judge Murray from Jonathan J. Margolis dated 8/26/75 re: Plaintiff's desire to waive hearing on motions for summary judgment, filed.

1975

Sept. 9 Letter to Judge Murray from Jonathan J. Margolis dated 9/5/75 enclosing a copy of a decision in the District Court for the Western District of Louisiana, filed.

10 Letter to Judge Murray dated 8/29/75 from Jerome Fink, Chief, Refund Trial Section No. 1, Dept. of Justice, advising that the defendant waives oral argument on the motions for summary judgment, filed.

1976

Jan. 22 MURRAY, J. MEMORANDUM AND ORDER ENTERED re plaintiff's and defendant's motions for summary judgment: ". . . deft's motion for summary judgment is granted, and pltfs' motion is hereby denied."

23 MURRAY, J. JUDGMENT ENTERED . . . "Judgment for the deft; complaint dismissed."

29 MURRAY, J. AMENDMENT TO FOOTNOTE IN MEMORANDUM AND ORDER OF JANUARY 22, 1976, ENTERED. Footnote 5 amended by striking out the sentence beginning with the words "In point of fact" and substituting the sentence "In point of fact, however, there is no definition of the term 'dividend' in section 312."

Mar. 12 Plaintiff's Notice of Appeal filed.

Apr. 21 Certified copy of docket entries and original pleadings forwarded to the Court of Appeals.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Case No. 76-1165

ARTHUR S. FULMAN, ET AL.,
PLAINTIFFS, APPELLANTS,
v.
UNITED STATES OF AMERICA,
DEFENDANT, APPELLEE.

[545 F.2d 268]

GENERAL DOCKET

1976

Apr. 23 Record on appeal, in one volume, filed and case docketed.
28 Appearance of Daniel D. Levenson and Jonathan J. Margolis for appellants received and filed.
30 Designation of contents of joint appendix received and filed.
May 3 Appearance of Scott P. Crampton and Gilbert E. Andrews for appellee filed.
28 Appendix to briefs and brief for appellant filed.
June 17 Brief for appellee filed.
18 Appearances of Gary R. Allen and Alfred S. Lombardi for appellee filed.
24 Reply brief for appellants filed.
Aug. 30 Assigned for hearing at September session.
Sept. 8 Heard by Coffin, Clark and Campbell, J.J.
Nov. 19 Judgment: The judgment of the District Court is affirmed. Opinion of the Court by Coffin, Ch.J. Notices mailed.

1976

Dec. 8 Verified and itemized bill of costs filed.
13 Taxation of costs filed. Mandate issued, copy filed and original papers returned to the district court. Notices mailed.

1977

Feb. 23 Notice of filing petition for certiorari filed (76-1137) Feb. 17, 1977.
May 31 Order of Supreme Court granting certiorari May 23, 1977.

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

CIVIL ACTION
No. 73-1109-M

PIERCE INVESTMENT CORP.,
PLAINTIFF,
v.
UNITED STATES OF AMERICA,
DEFENDANT.

COMPLAINT

1. This action is brought pursuant to Section 7422 of the Internal Revenue Code, Title 26, United States Code. This Court has original jurisdiction of the action under Title 28, Sections 1346(a)(1); and 1402 of the United States Code. The action seeks refund of taxes erroneously and illegally assessed and collected by the Commissioner of Internal Revenue.

2. Plaintiff is a corporation organized under the laws of the Commonwealth of Massachusetts. Plaintiff's usual place of business is located at 6 Pleasant Street, Malden, Massachusetts.

3. For the calendar years 1962 and 1963, the Plaintiff was a personal holding company, as defined in Section 542 of the Internal Revenue Code and was therefore liable to the tax imposed by Section 541 of the Internal Revenue Code.

4. Pursuant to Section 547 of the Internal Revenue Code the Plaintiff, on November 28, and December 31, 1966, declared deficiency dividends in order to extinguish its liability for tax under Section 541 of the Internal Revenue Code. (Copies of the records of these meetings are attached as Exhibit A). The deficiency dividends were paid in the form of securities having a fair market value of $32,535. Payment of a dividend in that amount would have eliminated Plaintiff's liability for tax under Section 541 of the Internal Revenue Code, which was determined to be $26,571.30. (A copy of Form 2198, Determination of Personal Holding Company Liability, reflecting this amount, is attached as Exhibit B).

5. Plaintiff timely filed, on January 24, 1967, Form 976, Claim For Deficiency Dividends Deduction, claiming deductions in the amount of $32,535. (A copy of this Form 976 is attached as Exhibit C).

6. Plaintiff's claim for deficiency dividends was denied to the extent that the amount claimed by Plaintiff exceeded Plaintiff's basis in the property distributed. As a result deficiencies were assessed for the calendar years 1962 and 1963 in the amounts of $2,981 and $8,095 respectively.

7. The deficiencies assessed were paid by the Plaintiff.

8. The Plaintiff filed timely claims for refund of the amounts paid. These claims were denied by letters dated June 3, 1971. (Copies of those letters are attached as Exhibit D).

9. The Internal Revenue Code of 1954, Title 26, United States Code, provides no justification for denying Plaintiff a deficiency dividends deduction equal to the fair market value of the property transferred.

WHEREFORE, Plaintiff prays that:

1. This Court determine that the assessment and collection of personal holding company tax under Section 541 of the Internal Revenue Code for the Calendar years 1962 and 1963 was erroneous and illegal.

2. This Court order a refund of the erroneously and illegally assessed and collected [tax], together with interest thereon as provided by law.

3. This Court award costs to the Plaintiff, as provided in Title 28, United States Code, Section 2412.

4. This Court grant such other relief as is just and proper.

PIERCE INVESTMENT CORP.
by its Attorneys
DANIEL D. LEVENSON
JONATHAN J. MARGOLIS

EXHIBIT A

I, Morris Fulman, Clerk of Pierce Investment Corp., hereby certify that the following is a true copy of the record of the minutes of a meeting of the Board of Directors of Pierce Investment Corp. held November 28, 1966, at which a quorum was present and voting.

"The President reported that the corporation had been determined to be a Personal Holding Company as defined in the Internal Revenue Code and consequently that a personal holding company tax deficiency was proposed against the corporation in the total amount of $26,571.30 for the taxable years 1959, 1960, 1962, and 1963. The President further reported that the personal holding company tax could be eliminated if "deficiency dividends", as defined in Section 547(d)(1) of the Internal Revenue Code are declared and paid to the stockholders in accordance with the procedures of said Section 547.

Upon motion made and duly seconded, it was

VOTED: That the corporation distribute to its stockholders cash or property with a fair market value on the date of distribution of $32,202.00, such distribution to take place within ninety days of November 3, 1966.

Upon motion made and duly seconded, it was

VOTED: That the President is herewith authorized to execute any documents required to effect the "deficiency dividends" deduction."

s/ MORRIS FULMAN
MORRIS FULMAN — *Clerk*

A true copy
ATTEST:

I, Morris Fulman, Clerk of Pierce Investment Corp., hereby certify that the following is a true copy of the record of the minutes of a meeting of the Board of Directors of Pierce Investment Corp. held on December 31, 1966, at which a quorum was present and voting.

"The President reported that as of December 1, 1966, the value of Schering Corporation stock was $55 per share, and the value of Gulf Corporation was $59 per share. He recommended that distribution be made to each of the stockholders as follows:

55 shares of Schering Corporation @ $55	— $3,025
10 shares of Gulf Corporation @ $59	— $ 590
	$3,615.

This would make a total distribution of $32,535.

On motion duly made and seconded, it was unanimously

VOTED: That the corporation distribute to each of its stockholders as a dividend 55 shares of Schering Corporation at $55 per share — $3,025, and 10 shares of Gulf Corporation at $59 per share — $590, totalling $3,615, in place of the dividend voted on November 28, 1966, in the total amount of $32,202."

s/ MORRIS FULMAN
MORRIS FULMAN — *Clerk*

A true copy
ATTEST:

EXHIBIT B

Form 2198
(Rev. May 1963)

U.S. TREASURY DEPARTMENT—INTERNAL REVENUE SERVICE

DETERMINATION OF LIABILITY FOR
PERSONAL HOLDING COMPANY TAX
Section 547(c)(3) of the Internal Revenue Code of 1954

Name of Taxpayer
Pierce Investment Corp.

Address of Taxpayer (*Number, street, city, postal zone, State*)
6 Pleasant Street, Malden, Massachusetts

The above-named taxpayer and the Commissioner of Internal Revenue agree that the taxpayer is liable for personal holding company tax and other income tax in the amount(s) and for the taxable year(s) shown below.

Taxable Year	Personal Holding Company Liability	Other Income Tax Liability	Total Income Tax Liability
1959	$4,796.30		$4,796.30
1960	8,374.00		8,374.00
1962	5,306.00	$21.00	5,327.00
1963	8,095.00		8,095.00

It is understood that if this determination is signed on behalf of the Commissioner, three signed copies will be sent to the taxpayer at the last known address by registered or certified mail; and that the date of registration (if sent by registered mail) or the date of the postmark on the sender's receipt (if sent by certified mail) shall be the date of determination. If, however, a deficiency dividend is paid before such registration or postmark date but on or after the date this agreement is signed on behalf of the Commissioner, the date of determination shall be such date of signing.

Corporate Name
PIERCE INVESTMENT CORP.

Signature of Officer	Title	Date
s/ David Borr	Pres.	10/19/66

Signature for the Commissioner
s/ Eugene F. Baritot

Title	Date
Asst. Chief Audit Div.	11/1/66

NOTE: This determination does not constitute a final closing agreement under Section 7121 of the Internal Revenue Code of 1954.

The determination must be signed with the corporate name, followed by the signature and title of the officers empowered to sign for the corporation, and the seal of the corporation must be affixed. If the corporation has no seal, a certified copy of the resolution of the board of directors giving the officer authority to sign must accompany the determination.

EXHIBIT C

FORM 976
(Rev. Apr. 1964)

U.S. TREASURY DEPARTMENT—INTERNAL REVENUE SERVICE

CLAIM FOR DEFICIENCY DIVIDENDS DEDUCTION OR CREDIT OR REFUND UNDER SECTION 547 OF THE INTERNAL REVENUE CODE

To be filed in duplicate. See Instructions on page 3.

1a. Name of Corporation
Pierce Investment Corp.

1b. Employer Identification number
04-6039354

2. Address (*Number and street, city or town, and State*)
6 Pleasant Street, Malden, Massachusetts 02148

3. Incorporated under the laws of
Massachusetts

4. Date
12/27/46

5. Amount of deficiency determined under subchapter C, Part II, of Chapter 1
$26,571.30

6. Taxable year or years involved
1959, 1960, 1962 and 1963

7. Amount of unpaid deficiency
$26,571.30

8. (a) If deficiency paid in whole or in part, amount thereof
None

9. If unpaid, how was deficiency established?
(Check) [ ] Tax Court decision
[ ] court judgment
[ ] closing agreement
[X] agreement under section 547(c)(3)
Date 11/1/66

• • •

14. Date deficiency dividend was paid in accordance with resolution of board of directors, or other authority, certified copy of which is attached hereto.
Date 12/31/66

15. Deficiency dividend was paid as follows:
Cash $ None
Other property: Fair market value $32,535
Adjusted cost basis $
State nature of other property
495 shares at $55 per share of Schering Corporation—$27,225 and 90 shares of Gulf Corporation at $59 per share—$5,310, totaling $32,525.

16. Amount of earnings and profit accumulated since February 28, 1913, and on hand at date of payment of deficiency
$42,096.76

17. Total amount of each class of stock outstanding at date of payment of deficiency dividend.
180 shares of common no par stock, 20 shares of which are held by each stockholder.

18.

Name and address of each shareholder	*Class of stock and number of shares of each class held at date of payment of deficiency dividend*	*Amount of such dividend paid to each shareholder on each class of stock*
(1) Max O. Berman, 320 Ferry St., Malden, Mass.	20 shares, no par common	$3,615
(2) David Borr, 497 Fellsway East, Malden, Mass.	20 shares, no par common	3,615

(3) Albert A. Frank, 265 Fellsway East, Malden, Mass.	20 shares, no par common	3,615
(4) Sydney Freedman, 59 Acorn Street, Malden, Mass.	20 shares, no par common	3,615
(5) Morris Fulman, 163 Hawthorne Street, Malden, Mass.	20 shares, no par common	3,615
(6) Ezra Green, 109 Savin Street, Malden, Mass.	20 shares, no par common	3,615
(7) Burton C. Grodberg, 547 Fellsway East, Malden, Mass.	20 shares, no par common	3,615
(8) Harry Reinherz, 24 Bartlett Street, Malden, Mass.	20 shares, no par common	3,615
(9) Matt D. Cooper, 30 Bartlett Street, Malden, Mass.	20 shares, no par common	3,615

19. Amount claimed as deficiency dividends deduction $32,202
20. Amount to be refunded $ none
21. Amount to be credited $ none

22. The time within which this claim may be legally filed expires, under section 547(e) of the Internal Revenue Code, on March 3, 1967. The claimant believes that this claim should be allowed for the following reasons:
The claimant has complied with the provisions of Code Section 547 and the regulations thereunder.

DECLARATION

Under penalties of perjury, I declare that this claim has been made on proper authorization, has been examined by me and is, to the best of my knowledge and belief, a true, correct, and complete statement of facts, made in good faith, pursuant to section 547 of the Internal Revenue Code and the regulations issue thereunder.

Pierce Investment Corp.
(*Name of corporation*)

[CORPORATE SEAL] s/ DAVID BORR
(*Name of officer*)

RECEIVED
CONFERENCE STAFF
JAN 25 1967
BOSTON DISTRICT

EXHIBIT D

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE CENTER AAJS MC MP
NORTH ATLANTIC REGION

DATE: June 3, 1971
IN REPLY REFER TO: RSC-105

CERTIFIED MAIL
Pierce Investment Corp.
6 Pleasant St.
Malden, MA 02148

Social Security Number or Employer Identification Number: 04-6039354
Document Locator Number: 04-351-108-40100-3
Type of Tax: 1120 Corporation Income Return
Period Ending: Dec. 31, 1962
Amount Claimed: $2,960.21
Date Claim Received: 1-24-67

Dear Taxpayer:

We have examined your claim for an adjustment of your taxes. I am sorry to tell you that we cannot allow your claim for the reasons stated below. This decision rests on certain provisions of the internal revenue laws and regulations.

This letter is your legal notice that your claim is disallowed in full.

If you wish to begin suit or proceedings for the recovery of any taxes, penalties, or other moneys for which this notice of disallowance is issued, the law requires you to do so within 2 years from the mailing date of this letter.

Sincerely yours,
s/ F. L. BROWITT
Director

Reasons for disallowance:
Per audit letter dated 2-1-71 from appellate office,
Boston, Mass.

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE CENTER AAJS MC MP
NORTH ATLANTIC REGION

DATE: June 3, 1971
IN REPLY REFER TO: RSC-105

CERTIFIED MAIL
Pierce Investment Corp.
6 Pleasant St.
Malden, MA 02148

Social Security Number or Employer Identification Number: 04-6039354
Document Locator Number: 04-351-108-40101-4
Type of Tax: 1120 Corporation Income Return
Period Ending: Dec. 31, 1963
Amount Claimed: $8,095.00
Date Claim Received: 6-26-70

Dear Taxpayer:

We have examined your claim for an adjustment of your taxes. I am sorry to tell you that we cannot allow your claim for the reasons stated below. This decision rests on certain provisions of the internal revenue laws and regulations.

This letter is your legal notice that your claim is disallowed in full.

If you wish to begin suit or proceedings for the recovery of any taxes, penalties, or other moneys for which this notice of disallowance is issued, the law requires you to do so within 2 years from the mailing date of this letter.

Sincerely yours,
s/ F. L. BROWITT
Director

Reasons for disallowance:
Per audit letter dated 2-1-71 from appellate office,
Boston, Mass.

[Title Omitted In Printing]

ANSWER

The defendant, the United States of America, by its attorney, James N. Gabriel, Acting United States Attorney for the District of Massachusetts, in response to the complaint answers and states as follows:

1. Admits the allegations contained in paragraph 1 of the complaint except denies that any taxes were erroneously and illegally assessed and collected from the plaintiff by the Commissioner of Internal Revenue.

2. Admits the allegations contained in paragraph 2 of the complaint.

3. Admits the allegations contained in paragraph 3 of the complaint.

4. Admits the allegations contained in paragraph 4 of the complaint.

5. Admits the allegations contained in paragraph 5 of the complaint.

6. Admits the allegations contained in the first sentence of paragraph 6 and lacks sufficient knowledge to form a belief as to the truth of the allegations contained in the second sentence of paragraph 6 of the complaint.

7. Lacks sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 7 of the complaint.

8. Admits the allegations contained in paragraph 8 of the complaint.

9. Denies the allegations contained in paragraph 9 of the complaint.

WHEREFORE, having answered each and every allegation in the complaint, the defendant demands judgment in its favor with costs to be paid by plaintiff.

JAMES N. GABRIEL
United States Attorney
By: s/ W. B. HOLLINGSWORTH
WAYNE B. HOLLINGSWORTH
Asst. United States Attorney

[Certificate Of Service Omitted In Printing]

[Title Omitted In Printing]

STIPULATION OF FACTS

The parties hereto, by and through their counsel, stipulate for the purpose of this civil action that the facts set forth below are true. However, they reserve to themselves the right to object to the materiality or the relevancy of any of said facts.

1. The plaintiff in the above-styled case is Pierce Investment Corp., having its principal place of business at 6 Pleasant Street, Malden, Massachusetts.

2. The defendant is the United States of America.

3. This action is brought by the plaintiff for the refund of Personal Holding Company tax imposed pursuant to Section 541 for the years 1962 and 1963.

4. Pursuant to an audit of the plaintiff's U.S. Corporation Income Tax Returns for the years 1959, 1960, 1962 and 1963 it was determined by the District Director, Boston, Massachusetts, that the plaintiff was a personal holding company as defined in Section 542(a) of the Internal Revenue Code.

5. As the result of the above determination the following personal holding company tax was proposed:

1959	$4,796.30
1960	8,374.00
1962	5,306.00
1963	8,095.00

6. The District Director's determination was incorporated in Form 2198, Determination of Liability for Personal Holding Company Tax pursuant to Section 547(c)(3) of the Internal Revenue Code of 1954. A true and exact copy of such form is attached hereto and made a part hereof as Exhibit No. 1.

7. Pursuant to Section 547 of the Internal Revenue Code, the plaintiff on November 28, 1966, declared a deficiency dividend in the amount of $32,535, the payment of which would eliminate the plaintiff's liability for the personal holding company tax. A true and exact copy of the minutes of the Board of Directors of the Plaintiff dated November 28, 1966, declaring the above deficiency dividend is attached hereto and made a part hereof as Exhibit No. 2.

8. On December 31, 1966, the plaintiff satisfied the deficiency dividend declaration by distributing to each shareholder 55 shares of Schering Corporation stock, and 10 shares of Gulf Oil Corporation stock. Attached hereto and made a part hereof as Exhibit No. 3 is a true and exact copy of the minutes of the plaintiff's Board of Directors' meeting held on December 31, 1966.

9. The plaintiff's total adjusted basis of the above securities distributed as the deficiency dividend was $18,725.11, while the fair market value of the same was $32,535.

10. On January 24, 1967, the plaintiff timely filed Form 976, Claim for Deficiency Dividends Deduction, claiming deductions in the amount of $32,535. A true and exact copy of the above claim is attached hereto and made a part hereof as Exhibit No. 4.

11. Plaintiff's claim for deficiency dividends deduction was denied by the District Director to the extent that the amount claimed by plaintiff, $32,535, exceeded the plaintiff's basis, $18,725.11, in the property distributed. As a result personal holding company tax deficiencies were as-

sessed on April 18, 1969, for the calendar years 1962 and 1963 in the amounts of $2,960.21 and $8,095.00, respectively.

12. On or about April 22, 1969, the plaintiff paid the above deficiencies in full. In addition the plaintiff on September 21, 1970, paid $180.04 representing interest on the personal holding company tax deficiency for 1962, and on April 22, 1970, the plaintiff paid $2,967.08, representing interest on the 1963 deficiency, ($3.31 was later refunded to the plaintiff).

13. Subsequently, the plaintiff filed timely claims for refund of the above amounts. True and exact copies of the plaintiff's claims for refund for 1962 and 1963 are attached hereto and made a part hereof as Exhibits Nos. 5 and 6, respectively.

14. On June 3, 1971, the plaintiff's claims for refund were rejected by the District Director of Internal Revenue by certified mail.

15. This Court has jurisdiction over the parties and the subject matter of this action by virtue of Section 1346 (a)(1), Title 28, United States Code.

s/MICHAEL VON MANDEL
Attorney for Defendant
s/JONATHAN J. MARGOLIS
Attorney for Plaintiff

EXHIBIT NO. 1

Exhibit No. 1 is printed above as Exhibit B to the Complaint at pp. 10-11.

EXHIBIT NOS. 2 AND 3

Exhibits No. 2 and No. 3 are printed above as Exhibit A to the Complaint at pp. 8-9.

EXHIBIT NO. 4

Exhibit No. 4 is printed above as Exhibit C to the Complaint at pp. 11-13.

EXHIBIT NO. 5

FORM 843
(Rev. June 1968)
U.S. Treasury Department
Internal Revenue Service

CLAIM

Name of taxpayer or purchaser of stamps
Pierce Investment Corp.

Number and street: 6 Pleasant St.
City or town, State, and ZIP Code: Malden, Mass. 02148

FILL IN APPLICABLE ITEMS—Use attachments if necessary

• • •

b. Employer identification number (if any)
04-6039354

c. Internal Revenue Service office where return (if any) was filed
Mass.

• • •

e. Period—if for tax reported on annual basis, prepare separate form for each taxable year
From January 1, 1962 to December 31, 1962

f. Kind of tax
Personal Holding Company

g. Amount of assessment: $2,960.21
Dates of payment: October 30, 1969

• • •

i. Amount to be refunded (if income tax, complete computation below)
$2,960.21

• • •

k. The claimant believes that this claim should be allowed for the following reasons:
See attached statement.

Under penalties of perjury, I declare that I have examined this claim, including accompanying schedules and statements, and to the best of my knowledge and belief it is true, correct, and complete.

s/ DAVID BORR

Dated 11/6/1969 — DAVID BORR, President

A determination was made that the taxpayer was a personal holding company for the taxable year 1962 and on November 1, 1966, Form 2198 was signed by a representative of the Commissioner of Internal Revenue.

On or about December 27, 1966, the taxpayer, pursuant to a vote of the Board of Directors, caused to be distributed to its stockholders securities with a sufficient fair market value to effect a distribution of all its undistributed personal holding company income. These distributions were reflected by the individual stockholders on their 1966 income tax returns as dividends to the extent of the fair market value of the securities received.

On January 24, 1967, Form 976, Claim for Deficiency Dividends Deduction, was filed with the Internal Revenue Service, claiming a deduction for the fair market value of the securities distributed. The Revenue Agent has improperly allowed a deficiency dividend deduction only for the cost basis of the securities distributed, and the personal holding company tax has been imposed on the difference between the cost basis and the fair market value of the distributed securities.

The taxpayer's claim is based upon the following analysis:

1. Under Section 547 "the term a 'deficiency dividend' means the amount of the dividends paid by the corporation on or after the date of the determination and before filing claim under subsection (e), which would have been includible in the computation of the deduction for dividends paid under section 561 for the taxable year with respect to which the liability for personal holding company tax exists, if distributed during such taxable year. • • •"

2. Section 561(a)(1) provides that "the deduction for dividends paid shall include the dividends paid during the taxable year."

3. Section 562(a) provides that "the term 'dividend' shall, except as otherwise provided in this section, include only dividends described in Section 316. . . ."

4. Under Section 316(a) a dividend means any distribution of property made by a corporation to its shareholders out of its current or accumulated earnings and profits.

5. Under Section 301(b)(1)(A), the amount of any corporate distribution to a non-corporate distributee is the amount of money received plus the fair market value of the other property received.

6. Regulation 1.316-1(a)(3) Example illustrates that the amount taxable as a dividend includes the fair market value, not merely the adjusted basis, of the property distributed.

The taxpayer alleges that there is no statutory justification for disallowing a deduction for "deficiency dividends" to the extent of the fair market value of the property distributed by the taxpayer to its stockholders, and that the assertion of a deficiency based upon the difference between the cost basis and fair market value of the securities distributed was improper.

PIERCE INVESTMENT CORP.
By s/DAVID BORR
President

EXHIBIT NO. 6

FORM 843
(Rev. Nov. 1968)
Department of the Treasury
Internal Revenue Service

CLAIM

Name of taxpayer or purchaser of stamps
Pierce Investment Corp.

Number and street: 6 Pleasant Street
City or town, State, and ZIP Code: Malden, Massachusetts 02148

FILL IN APPLICABLE ITEMS—Use attachments if necessary

• • •

b. Employer identification number (if any)
04-6039354

c. Internal Revenue Service office where return (if any) was filed
Mass.

• • •

e. Period—if for tax reported on annual basis, prepare separate form for each taxable year
From January 1, 1963 to December 31, 1963

f. Kind of tax
Personal Holding Company

g. Amount of assessment: $8,095.00
Dates of payment: April 23, 1970

• • •

i. Amount to be refunded (if income tax, complete computation below)
$11,062.08

• • •

k. The claimant believes that this claim should be allowed for the following reasons:
[See attached statement.]

Dated April 30, 1970

PIERCE INVESTMENT COMPANY
s/ DAVID BORR, President

SELECTED–FA
8-5-70

North Atlantic Service Center
Andover, Mass. 01812
JUN 26 1970
RECEIVED
I.R.S.

A determination was made that the taxpayer was a personal holding company for the taxable years 1962 and 1963 and on November 1, 1966, Form 2198 was signed by a representative of the Commissioner of Internal Revenue.

On or about December 27, 1966, the taxpayer, pursuant to a vote of the Board of Directors, caused to be distributed to its stockholders securities with a sufficient fair market value to effect a distribution of all its undistributed personal holding company income. These distributions were reflected by the individual stockholders on their 1966 income tax returns as dividends to the extent of the fair market value of the securities received.

On January 24, 1967, Form 976, Claim for Deficiency Dividends Deduction, was filed with the Internal Revenue Service, claiming a deduction for the fair market value of the securities distributed. The Revenue Agent has improperly allowed a deficiency dividend deduction only

for the cost basis of the securities distributed, and the personal holding company tax has been imposed on the difference between the cost basis and the fair market value of the distributed securities.

The taxpayer's claim is based upon the following analysis:

1. Under Section 547 "the term a 'deficiency dividend' means the amount of the dividends paid by the corporation on or after the date of the determination and before filing claim under subsection (e), which would have been includible in the computation of the deduction for dividends paid under section 561 for the taxable year with respect to which the liability for personal holding company tax exists, if distributed during such taxable year. • • •"

2. Section 561(a) (1) provides that "the deduction for dividends paid shall include the dividends paid during the taxable year."

3. Section 562(a) provides that "the term 'dividend' shall, except as otherwise provided in this section, include only dividends described in Section 316. . . ."

4. Under Section 316(a) a dividend means any distribution of property made by a corporation to its shareholders out of its current or accumulated earnings and profits.

5. Under Section 301(b)(1)(A), the amount of any corporate distribution to a non-corporate distributee is the amount of money received plus the fair market value of the other property received.

6. Regulation 1.316-1(a)(3) Example illustrates that the amount taxable as a dividend includes the fair market value, not merely the adjusted basis, of the property distributed.

The taxpayer alleges that there is no statutory justification for disallowing a deduction for "deficiency dividends" to the extent of the fair market value of the property distributed by the taxpayer to its stockholders, and

that the assertion of a deficiency based upon the difference between the cost basis and fair market value of the securities distributed was improper.

[Title Omitted In Printing]

MOTION FOR LEAVE TO AMEND THE COMPLAINT

1. This action was timely commenced by a complaint filed on April 10, 1973.

2. The above-named Plaintiff has been liquidated, and its assets transferred to Arthur S. Fulman and Neil A. Cooper, Trustees of the Pierce Investment Corp. Stockholders Trust under the provisions of applicable local law and Section 337 of the Internal Revenue Code of 1954.

WHEREFORE, Plaintiff prays that Arthur S. Fulman and Neil A. Cooper, Trustees of the Pierce Investment Corp. Stockholders Trust, be substituted as Plaintiffs in this action.

PIERCE INVESTMENT CORP.
by its Attorney
s/ JONATHAN J. MARGOLIS
JONATHAN J. MARGOLIS

ASSENT:

The defendant offers no objection to the substitution of Arthur S. Fulman and Neil A. Cooper, Trustees of the Pierce Investment Corp. Stockholders Trust, as plaintiffs in this action, provided that the substitution in no way limits the rights of the defendant which it is otherwise entitled to under the law.

s/ MICHAEL VON MANDEL
MICHAEL VON MANDEL
Trial Attorney
Tax Division
Department of Justice
Washington, D.C. 20530

[Title Omitted In Printing]

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiff moves the court as follows:

1. That it enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in plaintiffs' favor for the relief demanded in the complaint on the ground that there is no genuine issue as to any material fact and that plaintiff is entitled to a judgment as a matter of law. This motion is based upon:

(a) The stipulation of facts filed on August 8, 1972.

(b) Plaintiffs' memorandum of law, filed herewith.

ARTHUR S. FULMAN,
NEIL A. COOPER,
Trustees of
Pierce Investment Corp.
Stockholders Trust
By their attorneys
s/ DANIEL D. LEVENSON
DANIEL D. LEVENSON
s/ JONATHAN J MARGOLIS
JONATHAN J. MARGOLIS
Both of:
LOURIE & CUTLER
1 State Street
Boston, MA 02109
742-6720

[Title Omitted In Printing]

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Comes now the defendant, United States of America, by its attorney, James N. Gabriel, United States Attorney for the District of Massachusetts, and moves that judgment be entered in its favor, dismissing the complaint herein with prejudice and granting such costs to the defendant as are authorized by law, pursuant to Rule 56 of the Federal Rules of Civil Procedure, on the grounds that all relevant facts have been stipulated and that the defendant is entitled to judgment as a matter of law, all of which is set forth in detail in defendant's memorandum in support of its motion submitted herewith.

JAMES N. GABRIEL
United States Attorney
By s/ JAMES J. O'LEARY
JAMES J. O'LEARY
Assistant U.S. Attorney

Of Counsel:
MICHAEL VON MANDEL
Trial Attorney
Tax Division
Department of Justice
Washington, D.C. 20530
Telephone: (202) 739-3583

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION
No. 73-1109-M

ARTHUR S. FULMAN Et Al,
PLAINTIFFS,
v.
UNITED STATES OF AMERICA,
DEFENDANT.

AMENDMENT TO FOOTNOTE IN MEMORANDUM AND ORDER OF JANUARY 22, 1976

Footnote 5 is amended by striking out the sentence beginning with the words "In point of fact" and substituting therefor the following sentence:

> In point of fact, however, there is no definition of the term "dividend" in section 312.

The amendment does not deal with any matter of substance but is made for the purpose of accuracy and to avoid any possible misleading connotation of the word "reference" in the sentence which is stricken.

s/ FRANK J. MURRAY
United States District Judge

January 29, 1976